

Local Government (COVID-19 Emergency Response) Regulation 2020

Human Rights Certificate

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 41 of the *Human Rights Act 2019*, I, Stirling Hinchliffe, Minister for Local Government, Minister for Racing and Minister for Multicultural Affairs provide this human rights certificate with respect to the *Local Government (COVID-19 Emergency Response) Regulation 2020* (the Regulation) made under the *Local Government Act 2009* in reliance on the *COVID-19 Emergency Response Act 2020*.

In my opinion, the Regulation, as tabled in the Legislative Assembly, is compatible with the human rights protected by the *Human Rights Act 2019*. I base my opinion on the reasons outlined in this statement.

Overview of the Subordinate Legislation

On 29 January 2020, the then Minister for Health and Minister for Ambulance Services made an order under section 319 of the *Public Health Act 2005* declaring a public health emergency in relation to coronavirus disease (COVID-19). The public health emergency area specified in the order is for 'all of Queensland'. Its duration has been extended by regulation to 17 August 2020 and may be further extended.

On 11 March 2020 the World Health Organization declared the spread of COVID-19 a pandemic.

COVID-19 Emergency Response Act 2020

The *COVID-19 Emergency Response Act 2020* (the CER Act) was passed by the Legislative Assembly on 22 April 2020 and received assent on 23 April 2020. Section 25 provides that it expires on 31 December 2020.

The policy objectives of the CER Act include establishing a legislative modification framework of general application across the statute book (the modification framework) allowing legislative requirements to be modified in the following areas, should that be required:

- attendance at places or meetings, making and associated use of documents and physical presence requirements
- statutory timeframes
- proceedings of courts and tribunals.

The main purposes of the CER Act are listed in section 2 and include protecting the health, safety and welfare of persons affected by the COVID-19 emergency and facilitating the continuance of public administration, judicial process, small business and other activities disrupted by the COVID-19 emergency, including by easing regulatory requirements.

Section 5(4) of the CER Act provides that the Minister administering an affected Act may recommend the making of an extraordinary regulation under the Act only if satisfied the regulation is necessary for a purpose of the CER Act.

Part 3 of the CER Act is about reducing physical contact between persons. It includes section 8 which applies if an Act requires or permits a person to physically attend a place or meeting for a particular purpose or particular matter, including attendance before a person to answer questions. Section 8(3) provides that a regulation may make provision about how the purpose or matter can be achieved or otherwise dealt with in a modified way, including, for example, using communication technology.

Local Government Act 2009

Chapter 5A of the *Local Government Act 2009* (the LGA) is about Councillor conduct, including how complaints about the conduct of Councillors are to be investigated and dealt with. Section 150T provides that the Independent Assessor must investigate the conduct of a Councillor which is the subject of a complaint, notice, referral or information received by the Assessor. Part 4 of chapter 5A provides for the appointment of appropriately qualified persons as investigators to help the Assessor and gives investigators particular enforcement powers. Section 150AY of the LGA provides that the investigator's functions include investigating the conduct of Councillors as directed by the Assessor and investigating whether an offence has been committed against a 'conduct provision' (defined in section 150AY(b) of the LGA).

Section 150CJ(1) provides an investigator may require a person to attend a meeting with the investigator at a stated reasonable time and place and answer questions, related to the investigation of the conduct of a Councillor or an offence against a 'conduct provision', asked by the investigator. A maximum penalty of 50 penalty units applies.

The Regulation

To protect the health, safety and welfare of persons affected by the COVID-19 emergency and to facilitate ongoing public administration, the Regulation relies on section 8 of the CER Act to make modifications to section 150CJ of the LGA. The Regulation supports physical distancing measures associated with the COVID-19 public health emergency by providing alternatives for attending before an investigator and answering questions, thereby ensuring investigations can continue without close personal contact being required.

The Regulation provides that section 150CJ of the LGA applies as if certain changes were made. The changes include omitting section 150CJ(1) and inserting a provision under which an investigator may, by notice given to a person, require the person to answer questions by attending before the investigator to answer the questions in person, at a stated reasonable time and place, or by audio link or audio visual link, at a stated reasonable time; or by providing answers to the questions by email or other electronic means at or before a stated reasonable time. Definitions of audio link and audio visual link are provided. The Regulation expires on 31 December 2020.

Human Rights Issues

Human rights relevant to the subordinate legislation (Part 2, Division 2 and 3 *Human Rights Act 2019*)

I consider the following human rights to be relevant to the Regulation:

- Recognition and equality before the law (section 15 of the *Human Rights Act 2019*) – clause 3
- Right to life (section 16 of the *Human Rights Act 2019*) – clause 3
- Privacy and reputation (section 25 of the *Human Rights Act 2019*) – clause 3
- Fair hearing (section 31 of the *Human Rights Act 2019*) – clause 3

Consideration of reasonable limitations on human rights (section 13 *Human Rights Act 2019*)

(a) the nature of the right

Right to recognition and equality before the law

This right is a stand-alone right that also permeates all human rights. It encompasses both the right to recognition as a person before the law and the right to enjoy human rights without discrimination. The right to recognition as a person before the law refers to the right to universal recognition of legal personality of the human being. The right to equality reflects the universal principle of human rights: that every person holds the same human rights by virtue of being human and not because of some particular characteristic or membership of a particular social group

Witnesses are interviewed by investigators from the Office of the Independent Assessor for the purposes of gathering evidence either for a referral to the Councillor Conduct Tribunal about alleged misconduct by a Councillor or potentially for the prosecution of particular statutory offences in the Magistrates Court. The Regulation provides modified arrangements for providing information by answering questions to be used by the Independent Assessor in an investigation. The Regulation will impact on investigators and persons required to attend a meeting with an investigator, such as the Councillor who is the subject of the investigation, the complainant and witnesses including Local Government employees and other Councillors. The Regulation will ensure that investigations can continue so that complaints can be resolved and, if necessary, disciplinary action taken or offences prosecuted in accordance with community expectations.

The modified arrangements under the Regulation may limit the right, by disproportionately impacting certain groups such as those with limited access to technology, and elderly people and people with disabilities whose ability to understand and engage in the proceedings may be adversely impacted by the use of audio visual or audio systems. Language barriers may also be exacerbated by electronic communication without access to an interpreter.

Privacy and reputation

This right protects the individual from all interferences and attacks upon their privacy, family, home, correspondence (written and verbal) and reputation. The scope of the right to privacy is

very broad. It protects privacy in the sense of personal information, data collection and correspondence and also extends to an individual's private life more generally. The right to privacy protects individuals against unlawful or arbitrary interferences with their privacy. The concept of lawfulness in the context of the right to privacy means that no interference can take place except in cases envisaged by the law.

The Regulation provides for answering questions by attendance before an investigator by audio link or audio visual link and may limit the right to privacy, for example if a person is only able to remotely respond from a non-soundproof place where others can hear them, such as a public place. The nature of audio visual communication also increases the risk that communication may be intercepted or recorded without the consent of a person involved.

Fair hearing

This right affirms the right of individuals to procedural fairness when coming before a court or tribunal. The right includes that each party is given a reasonable opportunity to present its case. What constitutes a fair hearing will depend on the facts of the case and requires the weighing of public interest factors.

The Regulation provides for modified arrangements for answering questions by attendance before an investigator by audio link or audio visual link or by providing answers to the questions by email or other electronic means.

The modified arrangements under the Regulation may limit the right, by disproportionately impacting vulnerable groups, for example where language and communication barriers are exacerbated by electronic communication or where access to the required technology is not available. This may impact a person's capacity to adequately prepare documents to support their case.

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the Regulation, and of the limitation on the rights identified above, is to avoid the need for persons to be physically present at meetings and thus avoid the risks to health and life arising from COVID-19. The purpose is also to allow investigations to continue, unimpeded by the public health emergency, in a way that avoids the risks to health and life arising from COVID-19 and promotes the right to life.

The Regulation promotes certain human rights by enabling investigations to continue in safety, without breaching social distancing requirements and travel restrictions associated with the COVID-19 public health emergency.

Right to life: Every person has the right to life and has the right not to be arbitrarily deprived of life. The United Nations Human Rights Committee (UNHRC) has stated the duty to protect life also implies that State parties should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity. These general conditions may include the prevalence of life-threatening diseases.¹

¹ Human Rights Committee *General Comment No.36* 3 September 2019 [CCPR/C/GC/36] paragraph 26

In relation to the right to life, on 30 April 2020 the UNHRC noted that in the face of the COVID-19 pandemic, State parties must take effective measures to protect the right to life and health of all individuals within their territory and all those subject to their jurisdiction.²

The modified arrangements under the Regulation protect the right to life by avoiding the need for persons, including persons at greatest risk of danger to their health from the COVID-19 virus, to physically attend meetings.

The modified arrangements under the Regulation for answering questions asked by an investigator promote the right to recognition and equality before the law by providing alternative arrangements for gathering evidence, in circumstances where a person is unable to physically attend a meeting in person or where a requirement to be physically present would put at risk a person's health or wellbeing.

The modified arrangements under the Regulation also promote the right to a fair hearing by providing alternative arrangements for persons to provide information, including for a Councillor whose conduct is being investigated to present their case to the investigator, in circumstances where the person is unable to physically attend a meeting in person or where a requirement to be physically present would put at risk a person's health or wellbeing.

The purpose of the Regulation is consistent with a free and democratic society based on human dignity, equality and freedom. It ensures that investigations can proceed safely and without delay so that complaints can be resolved and, if necessary, disciplinary action taken or offences prosecuted in accordance with community expectations and addresses the issue that existing legislative requirements are inappropriate in the context of the COVID-19 public health emergency.

(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

The Regulation will achieve the purpose by allowing meetings with investigators to proceed safely and fairly and allowing investigators to obtain answers to questions while respecting social distancing requirements and travel restrictions associated with the COVID-19 public health emergency. The Regulation achieves the purpose by providing for modified arrangements for answering questions by attendance before an investigator by audio link or audio visual link or by providing answers to the questions by email or other electronic means.

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose

There are no less restrictive and reasonably available alternatives to achieve the purpose. The Regulation provides for safeguards to minimise risks, including that the investigator may choose the means by which a person meets the requirement to answer questions. The *Human Rights Act 2019* requires public entities to act or make decisions in a way that is compatible with human rights and to give proper consideration to human rights that may be affected by the decision. Therefore, decisions made under the Regulation must take into account the different circumstances of each individual in assessing the human rights impact of the decision. Further, the Regulation is a temporary measure and will expire on 31 December 2020.

² Human Rights Committee *Statement on derogations from the Covenant in connection with the COVID-19 pandemic* 30 April 2020 [CCPR/C/128/2] paragraph 2

- (e) the balance between the importance of the purpose of the limitation and the importance of preserving the human right, taking into account the nature and extent of the limitation

The Regulation strikes the appropriate balance between protecting human life in the context of a global pandemic and continuing public administration disrupted by the public health emergency, on the one hand, and limiting certain human rights on the other. Flexible alternative arrangements overcome the risk to life and health, while safeguards minimise the limitations on human rights to the extent possible.

- (f) any other relevant factors

Nil.

Conclusion

I consider that the Regulation is compatible with the *Human Rights Act 2019* because it does limit, restrict or interfere with a human right, but that limitation is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

STIRLING HINCHLIFFE MP
Minister for Local Government,
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